NO. 47588-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

FLOYDALE ECKLES, JR.,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KITSAP COUNTY

The Honorable Anna M. Laurie, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. REMAND IS NECESSARY TO CORRECT THE JUDGMENT AND SENTENCE.

The state agrees the court adopted Appendix H not Appendix F as conditions of community custody. Brief of Respondent (BOR) at 4-5. The state claims "conditions proposed in Appendix F cannot be imposed because not adopted by the trial court orally, by signature, or otherwise" and therefore no correction is required. BOR at 5. But on page 6 of the judgment and sentence a box is checked which reads:

> [x] **PSI CONDITIONS** – All conditions recommended in the Pre-Sentence Investigation are incorporated herein as conditions of community custody, in addition to any conditions listed in this judgment and sentence, unless otherwise noted: _____

CP 47.

There is nothing "otherwise noted," and therefore nothing to indicate to the department of corrections (DOC) that in fact the court did not incorporate DOC's recommended conditions listed in Appendix F to the PSI report. CP 70-71. This Court should remand so that the "PSI conditions" box in the judgment and sentence can be un-checked or crossed out, in keeping with the sentencing court's intent. In re Pers. Restraint of Mayer, 128 Wn.

App. 694, 701-02, 117 P.3d 353 (2005) (clerical mistakes in judgments arising from oversight or omission may be corrected by the court at any time). And because the state concedes the court had no authority to prohibit Eckles from possessing "tracking equipment," see BOR at 14, this error could be fixed on remand at the same time.

2. THE COURT WAS WITHOUT AUTHORITY TO IMPOSE SEVERAL CONDITIONS OF COMMUNITY CUSTODY.

(i) Unconstitutionally Vague Conditions

In his opening brief, Eckles challenged the conditions that he possess or access "no pornography" and/or "information pertaining to minors via computers" as unconstitutionally vague. BOA at 16. As the state notes, Eckles did not challenge the condition that he "shall not own, use, possess or peruse sexually explicit materials without authorization from the Community Corrections Officer and/or therapist." BOR at 5 (emphasis added). According to the state, the prohibition against "sexually explicit materials" is synonymous with "pornography" and Eckles has therefore waived his vagueness challenge. BOR at 6-10.

The state's argument is specious as our State Supreme Court analyzed "pornography" and "sexually explicit materials"

separately and concluded "pornography" is vague while "sexually explicit" is not. State v. Bahl, 164 Wn.2d 739, 758, 760, 193 P.3d 678 (2008). Ipso facto the court therefore did not see the terms as synonymous or interchangeable. The state's waiver argument should be rejected.

The state next argues that because the judgment and sentence requires Eckles "[p]ossess/access no pornography, sexually explicit materials, and/or information pertaining to minors via computer (i.e. internet)" that "sexually explicit" modifies "pornography" and therefore defines pornography as "sexually explicit material." BOA at 10. According to the state:

> Should [Eckles] seek to parse the condition and ask what kind of pornographic material he is prohibited from, he is answered that it is "sexually explicit material. He is clearly on notice of what is prohibited (sexually explicit pornography).

BOR at 10.

The problem with the state's argument is that it is essentially adding language into the judgment and sentence. The state's argument would have merit if the judgment and sentence read: "no pornography, meaning sexually explicit materials." But it doesn't. It reads: "pornography," *comma*, "sexually explicit material." CP 47. Under the most basic rules of grammar, "sexually explicit" modifies

"material" not "pornography." Moreover, the fact the judgment and sentence prohibits possession of both "pornography" and "sexually explicit materials" logically indicates they are not the same. Otherwise there would be no need to list them both. See e.g. State v. Reeves, 184 Wn. App. 154, 161, 336 P.3d 105 (2014) (a difference in language indicates a difference in intent). The state's argument that the reference in the judgment and sentence to "sexually explicit materials" somehow cures the vagueness challenge to "pornography" should also be rejected.

Regarding Eckles' vagueness challenge to the prohibition against possessing "information pertaining to minors via computer (i.e. internet)," the state suggests:

> At bottom, Eckles' argument is more a complaint about the scope of the prohibition than it is a complaint about the meaning of the term. Eckles argues that the condition is so broad that it could encompass news articles about high school football or whooping cough. Brief of Appellant at 15-16. This argument cuts against vagueness because it evinces a clear understanding that the prohibition is in fact very broad. Missing, however, is any argument explaining why a child rapist should not be that broadly restricted from anything to do with children. And, it is clear that the condition is not so broad that it restricts all internet use. The SRA policies of public safety and avoidance of recidivism are served by such a broad condition. Eckles knows from this condition that he is not to access any information

about children on the internet, including youth sports or youth medical issues.

BOR at 11 (emphasis added).

The state is forgetting the most important rule of sentencing conditions, however. Sentencing conditions must be *crime-related.* RCW 9.94A.505(8), .703(3)(f). A crime-related prohibition is an order of a court prohibiting conduct that *directly relates* to the circumstances of the crime for which the offender has been convicted. RCW 9.94A.030(10). If the condition in fact prohibits Eckles from accessing "anything to do with children" it is not crime-related. His offenses have nothing to do with reading news stories on the internet about high school sports or the spread of communicable diseases, such as influenza or whooping cough, at local schools. The state's argument trades one problem for another and should be rejected.

(ii) Conditions that Are Not Crime Related and therefore Unauthorized

Eckles challenged the condition prohibiting him from possessing "tracking equipment" as not crime-related. BOA at 16-18. The state concedes this condition is not crime-related: "The state can find no fact in the record or case analysis allowing a credible argument that this condition relates to anything Eckles

did." BOR at 14. The state concludes, "If not waived, the state concedes that this condition should be removed." BOR at 14.

It is well settled sentencing errors may be raised for the first time on appeal. Bahl, 164 Wn.2d at 744. Therefore, this Court should remand to the trial court for resentencing. Bahl, 164 Wn.2d at 762.

Eckles also challenged the condition that he "enter no bar or place where alcohol is the chief item of sale." CP 47, 55; BOA at 16-18. The state claims the condition is crime-related because drinking and drug use was involved in the offenses. BOR at 13.

Admittedly, the offenses involved drinking and drugs. However, the substances were always consumed at a private residence or at a house party, not at a bar or place where alcohol is the primary item of sale. Nor did Eckles meet either complainant at a bar or restaurant or other place that sells alcohol.

And as the state notes, a separate condition prohibits Eckles from possessing or consuming alcohol. CP 47, 56; BOR at 12. He is also prohibited from possessing and using illegal drugs and drug paraphernalia. CP 47, 55-56. Eckles has challenged neither condition. Thus, the state's concern that Eckles "be restricted from both illegal drugs and alcohol during community custody" is already

provided for. And as the state notes, Eckles' compliance with these prohibitions is subject to monitoring by his community corrections officer. BOR at 14.

Because the facts of the case have nothing to do with bars or other places where alcohol is the primary item for sale, the condition prohibiting Eckles from entering such a place is not crime-related and should be stricken.

3. THE COURT WAS WITHOUT AUTHORITY TO IMPOSE VARIOUS LEGAL FINANCIAL OBLIGATIONS.

(i) Unauthorized Expert Witness Fee where no Expert Testified

Eckles challenged the court's authority to impose a $100 contribution to the prosecuting attorney's Expert Witness Fund on grounds there was no expert that testified in his case. CP 48; BOA at 20-22. RCW 10.01.160(2) describes the scope and limitations on the type of costs that can be imposed:

> Costs shall be limited to expenses specially incurred by the state in prosecuting the defendant or in administering the deferred prosecution program under chapter 10.05 RCW or pretrial supervision. They cannot include expenses inherent in providing a constitutionally guaranteed jury trial or expenditures in connection with the maintenance and operation of government agencies that must be made by the public irrespective of specific violations of law.

Emphasis added.

"The state concedes that RCW 10.01.160(2) does not provide such authority" for the court to impose the expert witness fee. BOR at 15. According to the state, however, the fee is authorized under Kitsap County Code (KCC) chapter 4.84, because the ordinance allows imposition of the fee in any case to provide a general fund from which the prosecutor's office may draw to hire experts in other cases:

> However, the state disagrees with Eckles' reading of Kitsap County Code (KCC) chapter 4.84. First, that ordinance establishes a "fund" and is not for the purpose of reimbursing the county for the use of any particular expert in any particular case. This can be seen in section 4.84.040, which provides for "reasonable compensation to any expert witness who has provided or will provide services to the prosecuting attorney." (emphasis added). Clearly, then, the purpose is not solely for compensation of a particular expert in a particular case but to have a fund in place for any expert services that will arise.
>
> Eckles reading is unworkable. He assumes that this assessment must be in recompense for an expert used in his particular case.

BOR at 15-16.

The state puts forth a strained reading of the ordinance. And if interpreted as the state suggests, it would conflict with RCW 10.01.160(2) which directs that "costs shall be limited to expenses specially incurred by the state in prosecuting the defendant[.]"

Article XI, section 11 of the Washington Constitution provides that a city "may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws." The rule applicable to resolve a preemption issue provides that a state statute preempts an ordinance on the same subject if the statute occupies the field, leaving no room for concurrent jurisdiction, or if a conflict exists such that the statute and the ordinance may not be harmonized. Brown v. City of Yakima, 116 Wash.2d 556, 559, 807 P.2d 353 (1991).

Thus, the more reasonable and *harmonious* interpretation of the ordinance is that it allows the fee to be imposed when an expert's services was used in the particular case at hand. The statute and ordinance can be harmonized if the ordinance is interpreted in this fashion. Otherwise RCW 10.01.160(2) controls. In either case, the court did not have authority to impose the expert witness fee in Eckles' case.

(ii) Discretionary Attorneys Fees Imposed without Required Ability-to-Pay Inquiry

The court indicated its intent to impose "the standard legal and financial obligations." 1RP 45-46. Thus, it is unclear the court intended to impose the $1,135.00 in discretionary attorneys fees

that ended up on the judgment and sentence. Eckles argued remand was appropriate not only to clarify the court's intent, but because the court failed to consider Eckles' ability to pay. BOA at 22-23; State v. Blazina, 182 Wn.2d 827, 344 P.3d 680, 681 (2015); 1RP 45-46.

As the state suggests, it would be easy for the trial court to clarify its intent and conduct and ability-to-pay inquiry on remand, as there is clearly an issue with the "tracking equipment" prohibition:

> On this record, a practical solution may obtain: should this court decide that the above issue regarding possession of tracking gear should be reviewed even though not preserved below, the trial court could easily correct the LFO problem on remand of that issue.

BOR at 20.

In fact, that is what Division Three recently did under similar circumstances. State v. Diaz-Farias, __ Wn. App. __, __ P.3d __, 2015 WL 7734279, *9.[1] Because the court was remanding for review of other LFO issues, it directed "the sentencing court to engage in the individualized inquiry into the defendant's current and future ability to pay that is required by RCW 10.01.160(3)." Id.

[1] Only the Westlaw citation is currently available.

(iii) Unauthorized $500 Penalty to Kitsap County Special Assault Unit

Finally, Eckles challenged the imposition of a $500 penalty assessment dubbed, "Contribution – Kitsap County Special Assault Unit." CP 48; BOA at 19-20. The judgment and sentence includes no reference to any code section and does not cite any underlying ordinance. CP 48. There appears to be no authority for this fee. BOA at 18-19. It is well settled that at common law, costs in criminal cases were unknown, so that liability for costs arises only from statutory enactment. State v. Diaz-Farias, 2015 WL 7734279, *2.

In its response, the state does offer any authority for this fee or even address Eckles' argument there is no authority. Accordingly, the fee should be stricken from the judgment and sentence.

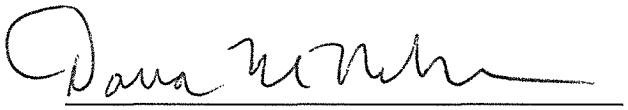
C. CONCLUSION

For the reasons stated in this reply and in the opening brief of appellant, this Court should remand for resentencing to correct the judgment and sentence, strike the unlawful conditions of community custody, as well as the unauthorized LFOs, and direct the court to conduct an ability-to-pay inquiry for the discretionary attorneys fees.

Dated this 4th day of January, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 4TH DAY OF JANUARY 2016, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] FLOYDALE ECKLES, JR.
DOC NO. 380667
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN, WA 98520

SIGNED IN SEATTLE WASHINGTON, THIS 4TH DAY OF JANUARY 2016.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

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